September 28, 2021

Chairwoman Lea Márquez Peterson
Commissioner Sandra D. Kennedy
Commissioner Jim O'Conner
Commissioner Justin Olson
Commissioner Anna Tovar

RE: Docket No. E-01345A-19-0236 – Recommended Order and Opinion of Assistant Chief Administrative Law Judge Sarah N. Harpring

Madam Chairwoman and distinguished members of the Commission,

I write to express my thoughts on the significant negative public policy and environmental implications of the Recommended Opinion and Order ("ROO") recently issued in APS's 2019 Rate Case (Docket No. E-01345A-19-0236). What follows is my personal and professional opinion, but I want to make it clear that I have been retained by APS to share this opinion with the Commission.

Adopting the ROO's recommendation to reject APS's request to recover its investment in pollution controls would make future enforcement of environmental laws against facilities regulated by this Commission much more difficult for my successors at the Arizona Department of Environmental Quality ("ADEQ") and the federal Environmental Protection Agency ("EPA"). This is not in the best interest of the State of Arizona, its environment, or its citizens.

As an experienced environmental policy maker, both in Arizona and for the federal government, I have personally observed that industry will invest in environmental protection only when they have *regulatory certainty* about these investments. I'm deeply concerned that this ROO substantially undermines and damages such regulatory certainty in Arizona, with serious consequences for the State's environment.

Specifically, the ROO's treatment of Arizona Public Service Company's ("APS") investments into highly effective pollution controls (i.e., Selective Catalytic Reduction ("SCR") for the Four Corners Power Plant ("4CPP"), which were absolutely necessary and required by federal environmental law for the plant to continue operating past 2016, should be rejected by this Commission. Given that continued legal operation of the plant would have been impossible without the these highly complex controls—a fact that became apparent well before the Company acquired its interests in Units 4 and 5 of 4CPP—APS proceeded with its investments into these controls after this Commission signed-off on this acquisition as being cost-effective and prudent for APS's customers. By ignoring this key regulatory context, in particular the legal requirements for the 4CPP to upgrade its pollution controls or be forced to close in 2016[1], the ROO reaches a decision that is bad for the citizens of Arizona because it disregards the good faith investments made by an electric utility into new, cost-effective technologies as agreed upon with EPA and that undeniably reduced pollutant emissions, producing cleaner electricity and a cleaner environment.

[1] Pursuant to an alternative, more cost-effective and environmentally beneficial compliance strategy proposed by APS, the final deadline for SCR installation was moved to July 31, 2018.

ADEQ AND EPA EXPERIENCE

I have had the distinct honor of being a long-time civil servant, serving nearly 20 years at ADEQ in various staff level and management positions relevant to this matter, including as the Air Quality Enforcement Coordinator (1998-1999), as the ADEQ Enforcement Coordinator and manager of the Air Quality Compliance and Enforcement Section (2003-2007), and ultimately as the agency's Director (2010-2015). In addition, I served as the Chief Operating Officer for the State of Arizona (2015-2017), and the Chief Operating Officer (2017-2021), and Acting Deputy Administrator (2018-2019) of EPA. I have the distinct honor of being the only ADEQ Director who joined the agency as a staff-level employee and worked in each of its three environmental program divisions, Air Quality, Water Quality and Waste Programs. As a former environmental protection policymaker for both the State of Arizona and the United States, as a trained engineer, and as an experienced government lawyer who personally resolved dozens of environmental enforcement cases valued at tens of millions of dollars, I bring a unique perspective to the ROO that is now pending before this Commission.

After my 20 years of experience at ADEQ and EPA, I can attest that it is incredibly difficult for environmental regulators to incent companies to upgrade their pollution control devices. As a result, and for the benefit of the environment, I firmly believe that companies who invest in pollution control equipment should be afforded regulatory certainty when it comes to recovery of the associated costs. Controls are often very expensive, with the costs impacting the company's position and pricing in the marketplace. Moreover, pollution control upgrades often involve years of planning, design, development, and construction before they can be put into service. In my experience, companies almost always expressed grave concerns about the impact of these costs on the affordability of their product or the viability of their on-going operations. In return for these large expenses, companies invariably and understandably seek certainty in outcome. As a regulator, my approach was to provide companies with as much regulatory certainty as possible, especially when they agreed to expend significant resources related to the environmental protection I was seeking. When disputes arose, I felt it was in the best interest of the State and its citizens to work collaboratively, balancing the impacts to all parties involved. This would often lead to solutions that achieved faster and more significant environmental benefits than protracted litigation. The court-sanctioned agreement between APS and EPA regarding 4CPP is exactly this type of solution, which has been put at risk by the ROO.

REGULATORY BACKGROUND ON THE FOUR CORNERS SCRS

Given the regulatory requirements associated with the SCRs, it is impossible to separate the continued operation of Four Corners for APS customers—which the Commission has explicitly deemed prudent—and the plant's SCRs. The plant and its pollution controls function together as a unified operation to provide reliable service for APS customers.

The legal requirement to operate 4CPP only with SCRs equipped stems from the Clean Air Act's federal Regional Haze program, which require sources like those at 4CPP to install "best available retrofit technology" ("BART") to address the emission of pollutants, such as ozone precursors like oxides of nitrogen ("NOx"), that "contribute to the impairment of visibility" within federally protected areas (e.g., National Parks). *See* 42 U.S.C. § 7491. For stationary sources like the 4CPP, BART compliance is an inescapable legal requirement of the Clean Air Act and EPA's BART determinations are virtually never overturned in court. In addition, SCR has become widely promoted by EPA as the BART technology for visibility at power plants. In October 2010, EPA initially proposed that BART for 4CPP would require the

installation of SCRs on all five units of the plant by 2016;. *See* 75 Fed. Reg. 64,221 (Oct. 19, 2010). This outcome, had it been finalized, would have been incredibly costly for APS and its customers.

Based upon an alternative pollution control strategy developed by APS, EPA subsequently proposed to find that BART compliance for 4CPP could be achieved by permanently retiring FCPP Units 1, 2, and 3 by 2014 and installing SCRs only on Units 4 and 5 by July 31, 2018. *See* 76 Fed. Reg. 10530 (Feb. 25, 2011). Importantly, EPA recognized and based its new proposal on data submitted by APS showing that this alternative approach would produce greater overall reductions in all forms of pollution, not just visibility-impairing pollution—demonstrating significant reductions in ozone precursors, carbon emissions, and water consumption and wastewater discharges. *See id.* at 10,532. As a result, APS's cooperation with EPA resulted in ***better*** environmental outcomes than EPA had originally proposed. As someone who has been an environmental regulator for over 20 years, I can attest that this is exceedingly rare.

By agreeing with EPA to greater overall pollution reductions, APS was able to avoid the significant costs of litigation and the even more significant costs of installing SCR on three additional units. This was an outstanding outcome for APS and its customers in Arizona, for EPA, and for the Navajo Nation community where 4CPP operates. EPA finalized this course of action in an August 24, 2012 notice, *see* 77 Fed. Reg. 51,619 (Aug. 24, 2012). At the same time, APS resolved a pending lawsuit from various environmental organizations that alleged violations of the Clean Air Act at 4CPP. *See* Case No. 1:11-cv-00889-JB-SCY (D.N.M, Aug. 17, 2015). By agreeing to permanently retire 4CPP Units 1, 2, and 3 and to install SCRs on 4CPP Units 4 and 5, APS was able to resolve EPA's legal action as documented in a court-approved Consent Decree, which was finalized and entered on August 17, 2015. This decree built upon but not did not drastically change the BART requirements EPA finalized in 2012; instead, it further reduced certain emission limits and advanced the deadline to install SCRs on one unit at 4CPP to March 31, 2018. As a result, APS's BART compliance strategy for 4CPP enabled EPA, and community stakeholders to not only create far-greater environmental benefits than if EPA had acted alone, but to also resolve a long-running legal dispute at little to no additional cost to APS ratepayers. This is exactly the type of outcome we should be celebrating and incenting in the name of creative environmental protection, not criticizing long after the fact by refusing to allow the recovery costs for honoring one side of the deal.

RECOMMENDATION

Disallowing the recovery of the investments made in the 4CPP SCRs more than nine years after APS, stakeholders, and EPA finalized a BART compliance strategy for 4CPP, six years after construction started, and almost four years after the controls became been operational, pulls the rug out from a collaboration that produced the best possible environmental outcome under the circumstances. Should the ROO be finalized as it stands now, companies regulated by the Arizona Corporation Commission will be far less likely to engage in creative and collaborative problem solving with environmental regulators because they will be at risk of having their investments in pollution control and clean-energy technologies second-guessed years after the fact.

While I was not directly involved with EPA's and APS's collaborative approach to addressing environmental compliance at 4CPP, it reflects the kind of collaboration and problem-solving that policymakers, including this Commission, should be supporting, rather than undermining, not only because of the cost-savings it creates for ratepayers, but also because it produces better outcomes for the environment. APS's decision to close 4CPP Units 1, 2, and 3 early in 2013, in conjunction with EPA's

allowing additional time before SCRs would be needed on Units 4 and 5 (by July 31, 2018) has resulted in the following:

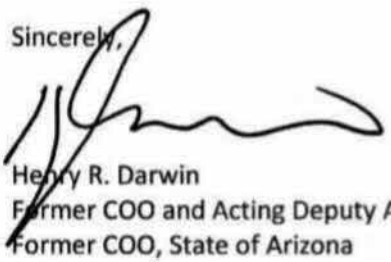
- Substantially reduced carbon emissions from the plant;
- Elimination of the vast majority of all haze and ozone forming pollutants from the plant (e.g., reducing more than 26,000 tons of NOx and 6,500 tons of SO2 emissions);
- Significantly reduced toxic air pollutants, such as mercury; and
- Drastically lowered water consumption and wastewater discharges.

These environmental benefits ***far exceeded*** those that would have resulted simply from EPA's initial requirements to install SCRs on all five units. At the same time, the plant was able to remain in operation providing reliable electricity service for APS's customers, while also providing jobs and revenue for the Navajo Nation. In my view, these are exactly the types of outcomes that ADEQ, EPA and this Commission should be seeking for the citizens of Arizona.

By undermining these outcomes, it is my opinion that the ROO is not just inconsistent with longstanding regulatory practice, it is simply bad public policy. Accordingly, I strongly encourage the Commission to restore cost recovery for APS's investments into the 4CPP SCRs.

Thank you for this opportunity to provide my comments to the record.

Sincerely,



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